APPENDIX

Excerpted Portions of Brief of Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6315

FEDERAL DEPOSIT INSURANCE CORPORATION, AS MANAGER OF THE FSLIC RESOLUTION FUND, STATUTORY SUCCESSOR TO THE FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY
Plaintiff-Appellant,

-against-

SHRADER & YORK, a Texas Partnership in Dissolution; SHRADER, YORK, CLOTE, HINDS, & GROTE, P.C., Successor Organization to SHRADER & YORK; SHRADER, CLOTE, HINDS & GROTE, P.C.; and WILLIAM E. YORK; WILLIAM C. SHRADER; PAUL D. CLOTE; GARY E. GROTE; ELDON L. HINDS; LEE H. HENKEL III; DOUGLAS A. PAISLEY II; and J.D. PAGE
Defendants-Appellees.

On Appeal from the United States District Court
of the Southern District of Texas
Houston Division

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

1. The district court erred in dismissing the FDIC's suit for lack of standing.

2. The district court erred in not tolling the statute of limitations under the discovery rule or the doctrine of adverse domination.

3. The district court erred in dismissing FDIC's suit for malpractice under a proximate cause test for securities cases based on fraud or deceit.

4. The district court erred in holding that a law firm's general partner who receives benefits from a contract has no personal liability regarding the contract.

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The district court erroneously concluded that the statute of limitations had expired by inferring that Adams' control of Lamar and City provided him with knowledge of S&Y's malpractice, and that Adams' knowledge could be imputed to the thrifts to start the running of the statute of limitations. The district court ignored the requirements of Texas law that mandate that a statute of limitations can only begin to run when a disinterested corporate official discovers facts establishing the elements of the malpractice claim. S&Y never demonstrated that Adams was disinterested or that he knew of the facts establishing S&Y's malpractice. Accordingly, summary judgment was inappropriate.

Furthermore, the district court erred in imputing Adams' knowledge to Lamar and City. This imputation was wrong not only because Adams' acts were adverse to Lamar and City, but because the FDIC, as statutory representative of the institution and its creditors, is not bound by the wrongful acts of the thrifts and their officials. Moreover, only innocent parties are entitled to impute the knowledge of the agent's misconduct to the principal; here, S&Y is clearly not an innocent party for it failed in its duty to protect the thrifts from Adams'

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misconduct. Lawyers who breach their obligations should not be shielded from accountability by legal formulations, such as imputation, or inferences drawn from the misconduct of a client's officer.

Additionally, the district court erred in not tolling the statute under the doctrine of adverse domination. Under the doctrine, the courts have held that the statute of limitations for claims against wrongdoing corporate officials is tolled until they relinquish control of the institution. Moreover, because management cannot be expected to sue those outsiders that might focus attention on their own wrongdoing, the doctrine has been applied to claims against outside professionals such as lawyers and accountants.

The district court erred in holding that the FDIC failed to show that S&Y's malpractice proximately caused losses to Lamar and City. The court mistakenly based its holding on a proximate cause analysis only relevant to federal securities law fraud claims, which has no relation to an attorney malpractice action. Under Texas law, attorney malpractice sounds in negligence, and under Texas negligence law, causation exists if S&Y's conduct was a substantial factor in bringing about the damages suffered by the thrifts. Under the facts submitted by the FDIC, S&Y's conduct clearly brought about these damages. For example, in three of the transactions described in the complaint, S&Y did not inform the Lamar board of directors that the transactions violated federal law. Armed with proper advice, the directors would not have approved and this would have stopped the losses. S&Y's negligence was a substantial contributing factor to the losses Lamar suffered on these transactions.

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B. The District Court Erred In Imputing Any Knowledge Adams May Have Had About S&Y Activities To Lamar And City, And Thus To FDIC

1. *Imputation Is Inappropriate Against FDIC As Successor To FSLIC As Receiver.*

Here, the FDIC, as successor to FSLIC as receiver for Lamar and City, is expressly granted the rights to assert claims on behalf of the thrift and its creditors. 12 C.F.R. § 549.3(a); 12 C.F.R. § 548.2(f) ("[The Receiver may] in every way . . . represent the association, its members and creditors") (regulations in effect when receiver was appointed for Lamar and City). Further, pursuant to 12 U.S.C. § 1821(d)(2)(A)(i), the FDIC has the authority to represent the rights of the institution, and of any stockholder, member, accountholder, depositor, officer or director of such institution holding his or her deposits. A receiver is not bound by the wrongful acts of its predecessor when it has a statutory mandate to assert claims not only on behalf of the failed institution, but also on behalf of creditors whose rights it obtained by operation of law. *Lank v. New York Stock Exchange*, 548 F.2d 61, 67 (2d Cir. 1977) ("where [a receiver] represents the creditors as well as the estate, he may sometimes sue in that right where the estate could not.)" [20]

FDIC sues wrongdoers who cause losses at federally insured banks and thrifts that have failed to enrich the receivership estate, or if the claim has been assigned to the Corporation, to recover for the Insurance Funds, thereby benefiting depositors and creditors. Because of this FDIC fits within an established exception to the general rule that the assignee is bound by the acts of its predecessor. Accordingly, as a matter of federal law Adams' actions or knowledge should not be imputed to the FDIC to trigger the running of the statute. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988). The district court's decision imputing Adams' knowledge to the FDIC should be reversed.

Excerpted Portions of the Memorandum of Points and Authorities in Support of the FDIC's Opposition to Shrader & York's Motion for Summary Judgment

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. No. H-91-1372

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC RESOLUTION FUND, Statutory Successor to the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, In Its Corporate Capacity

Plaintiff,

vs.

SHRADER & YORK, a Texas Partnership in Dissolution; SHRADER, YORK, CLOTE, HINDS AND GROTE, P.C. Successor Organization to SHRADER & YORK; SHRADER, CLOTE, HINDS AND GROTE, P.C. Successor Organization to SHRADER, YORK, CLOTE, HINDS AND GROTE, P.C.; WILLIAM E. YORK, WILLIAM C. SHRADER; PAUL D. CLOTE; GARY E. GROTE; ELDON L. HINDS; LEE H. HENKEL III; and DOUGLAS A. PAISLEY II

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE FDIC'S OPPOSITION TO SHRADER & YORK'S MOTION FOR SUMMARY JUDGMENT

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2. *If a two-step analysis is used, the result is the same.*

Prior to FIRREA, some courts used a two-step analysis. See *FSLIC v. Williams,* 599 F. Supp. 1184 (D. Md.

1984); *FDIC v. Buttram,* 590 F. Supp. 251 (N.D. Ala. 1984). The Defendants will assert that that is the proper standard. The FDIC disagrees but, as shown below, the result is the same. The action was filed timely.

Under the two-step analysis, the first issue is whether the applicable state limitations period had expired when the FDIC acquired the claim for malpractice. The second step is whether the claim was brought within the federal limitations period after it was acquired by the FDIC.

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Excerpted Portions of the Supplemental Response of the FDIC in Opposition to the Motion of Shrader & York, *et al.* for Summary Judgment, or, to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted and Response of the FDIC in Opposition to the Supplemental Motion of Paul D. Clote, Gary E. Grote and Eldon Hinds for Partial Summary Judgment

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-91-1372

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC RESOLUTION FUND, Statutory Successor to the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, in Its Corporate Capacity

Plaintiff,

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SHRADER & YORK, a Texas Partnership in Dissolution; SHRADER, YORK, CLOTE, HINDS, AND GROTE, P.C. Successor Organization to SHRADER & YORK; SHRADER, CLOTE, HINDS AND GROTE, P.C.; WILLIAM E. YORK, WILLIAM C. SHRADER; PAUL D. CLOTE; GARY E. GROTE; ELDON L. HINDS; LEE H. HENKEL III; and DOUGLAS A. PAISLEY II

Defendants.

SUPPLEMENTAL RESPONSE OF THE FDIC IN OPPOSITION TO THE MOTION OF SHRADER & YORK, ET AL. FOR SUMMARY JUDGMENT, OR, TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND RESPONSE OF THE FDIC IN OPPOSITION TO THE SUPPLEMENTAL MOTION OF PAUL D. CLOTE, GARY E. GROTE AND ELDON L. HINDS FOR PARTIAL SUMMARY JUDGMENT

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2. *In The Alternative, Under A Two-Step Analysis, The FDIC's Action Is Timely Filed.*

Under a two-step analysis, the Court must first determine whether the applicable Texas limitations periods had expired before the FDIC acquired the state law causes of action it alleges here, and, if not, whether the applicable federal limitations period expired between the date the FDIC acquired the action and the date it filed suit. *See FDIC v. Howse,* 736 F. Supp. 1437, 1440 (S.D. Tex. 1990).

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